

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

EDWARD L. TURNER,
Plaintiff,
v.
WARREN E. RUPF; et al.,
Defendants.

No. C 05-2297 MHP (pr)

**ORDER DISMISSING UNSERVED
DEFENDANTS AND DENYING
PLAINTIFF'S MOTION FOR
PARTIAL SUMMARY JUDGMENT**

A. Unserved Defendants

The court ordered plaintiff, Edward Turner, to provide current addresses for defendants Haynes and Robinson no later than June 29, 2007, so that each could be served with process. The court also cautioned Turner that these defendants would be dismissed if he did not provide an address for each. Turner did not provide an address for either defendant and the deadline by which to do so has passed. Accordingly, defendant Haynes and defendant Robinson are dismissed without prejudice from this action.

B. Turner's Motion For Partial Summary Judgment

Turner moved for partial summary judgment, seeking judgment as a matter of law on his two Eighth Amendment claims asserted against defendant deputy Oliver. Extended discussion of the motion is not necessary because Turner has fallen so far short of his burden to show his entitlement to judgment as a matter of law against deputy Oliver.

On issues as to which the moving party bears the burden of proof at trial -- such as Turner does on his Eighth Amendment claims -- he must come forward with evidence which would entitle him to a directed verdict if the evidence went uncontested at trial. See Houghton v. Smith, 965 F.2d 1532, 1536 (9th Cir. 1992); cf. Calderone v. United States, 799

1 F.2d 254, 259 (6th Cir. 1986) (when moving party has the burden (e.g., a plaintiff on his
2 claim for relief), "his showing must be sufficient for the court to hold that no reasonable trier
3 of fact could find other than for the moving party.") He must establish the absence of a
4 genuine issue of fact on each issue material to his claim. Id. at 1537. Once the moving party
5 has come forward with this evidence, the burden shifts to the non-movant to set forth specific
6 facts showing the existence of a genuine issue of fact on the claim.

7 To establish his entitlement to summary judgment on each of his Eighth Amendment
8 claims, Turner had to prove that (1) he had a serious medical need or condition and (2) the
9 defendant acted with deliberate indifference to that need or condition. See McGuckin v.
10 Smith, 974 F.2d 1050, 1059-60 (9th Cir. 1992), overruled on other grounds, WMX
11 Technologies, Inc. v. Miller, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc). A prison
12 official is deliberately indifferent if he knows that a prisoner faces a substantial risk of
13 serious harm and disregards that risk by failing to take reasonable measures to abate it. See
14 Farmer v. Brennan, 511 U.S. 825, 837, 844 (1994).

15 Turner's first claim against deputy Oliver alleged that, on or about February 13, 2003,
16 deputy Oliver and deputy Gray forced Turner to move up to the second floor of the jail, even
17 though they knew he had a knee problems and a brace on his leg that required him to be
18 housed on the first floor. On his second trip, Turner fell down the stairs and had to be taken
19 to an outside hospital emergency room for care. See Second Amended Complaint, ¶ 9. In
20 support of his motion for summary judgment, Turner submitted his declaration in which he
21 stated that he had talked to deputy Oliver, as well as other custodial and medical staff about
22 his knee brace and need to remain on the first floor. His evidence was quite lacking as to
23 deputy Oliver's mental state, however, and mostly consisted of conclusory statements that
24 deputy Oliver acted with various bad intentions. Turner's evidence was not such that he
25 would have been entitled to judgment as a matter of law on this claim in that he provided no
26 evidence that he alerted Oliver to a particular risk of him falling down the stairs if he had to
27 climb the stairs in his knee brace. Even if Turner had met his initial burden on summary
28 judgment, deputy Oliver's declaration submitted in opposition to the motion for summary

judgment raised a triable issue of fact as to whether he acted with deliberate indifference. Deputy Oliver stated that, although Turner claimed he could not climb the stairs to the second level tier of cells, deputy Oliver "had previously seen plaintiff traverse the stairs on numerous occasions to watch television" and "felt the reassignment could be handled safely." Oliver Decl., ¶ 4. Oliver also declared that he did not act for a malicious purpose but instead reassigned Turner to a new cell consistent with jail protocol as there had been fighting among several inmates earlier that day and the Sheriff's policy was to reassign inmates to different cells following fights among the inmates. Id. at ¶¶ 2, 4. Oliver demonstrated the existence of a triable issue of fact as to whether he acted with deliberate indifference to a known medical need or condition. Turner is not entitled to summary judgment on this claim against deputy Oliver.

Turner's second claim against deputy Oliver alleged that, on February 22, 2003, deputy Oliver tripped over Turner's outstretched leg while Turner was sitting in the day room, causing great pain to Turner. Oliver later laughed and joked about it to co-workers. See Second Amended Complaint, ¶ 11. Turner's declarations in support of his motion for summary judgment stated that there were other ways deputy Oliver could have traversed the room – implying that the existence of alternative routes of travel showed an intent to cause harm by taking the route that led him to trip over Turner's leg. Turner's evidence came nowhere near to showing that the only reasonable conclusion that could be reached was that deputy Oliver acted with deliberate indifference to Turner's knee problems. A reasonable trier of fact could find just as easily that deputy Oliver tripped over Turner's leg accidentally. Turner's assertion that deputy Oliver laughed and joked about the matter after the fact is not sufficient to support a finding as a matter of law that he acted with deliberate indifference when he tripped.

Turner also argued that deputy Oliver used excessive force in each of these incidents. The court had not identified either claim as an excessive force claim in the Order of Service And Partial Dismissal; rather, the court had identified both claims as deliberate indifference to medical needs claims. An excessive force claim is more difficult to prove, as it requires

1 that the correctional officer apply force maliciously and sadistically for the very purpose of
2 causing harm. See Hudson v. McMillian, 503 U.S. 1, 6 (1992) (citing Whitley v. Albers, 475
3 U.S. 312, 317 (1986)). To the extent Turner was trying to add an excessive force claim, it
4 must be dismissed because physical force was not alleged to have been used on Turner by
5 Oliver in at least the first incident. Moreover, while the allegations of the second amended
6 complaint, liberally construed, may have stated a claim that deputy Oliver acted with
7 deliberate indifference, they came nowhere near alleging the malicious and sadistic use of
8 force when he tripped over Turner's leg.

9 Turner's motion for summary judgment on his claims against deputy Oliver is
10 DENIED. (Docket # 42, # 48.)

11 IT IS SO ORDERED.

12 Dated: July 17, 2007



Marilyn Hall Patel
United States District Judge